IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LINDSAY GROSSCUP, on behalf of herself and all other persons similarly situated, known and unknown, Plaintiff, v. KPW MANAGEMENT, INC., and HERE'S WINGS, LLC, Defendants.	Case No. 1:16-cv-06501 Judge John J. Tharp Magistrate Judge Young B. Kim

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR STEP-ONE NOTICE

s/ Laura E. Reasons
Noah A. Finkel
nfinkel@seyfarth.com
Laura E. Reasons
lreasons@seyfarth.com
SEYFARTH SHAW LLP
131 South Dearborn Street, Suite 2400
Chicago, Illinois 60603
(312) 460-5000

Attorneys for Defendants KPW MANAGEMENT, INC., and
HERE'S WINGS, LLC

Plaintiff Lindsay Grosscup claims that Defendants KPW Management, Inc. and Here's Wings, LLC ("Defendants" or "KPW") violated the tip credit provision of the Fair Labor Standards Act (FLSA) by allegedly: (1) requiring servers and bartenders to perform duties unrelated to their tipped occupations; (2) requiring servers and bartenders to perform related, non-tipped duties in excess of 20% of their working time; and (3) improperly requiring tipped employees to reimburse Defendants from their tips for walkouts and cash drawer shortages. Plaintiff seeks to conditionally certify a collective action of tipped employees at 23 restaurants in two states based on the vague testimony of five employees from four restaurants. Plaintiff's motion should be denied.

Plaintiff has not identified a common unlawful policy or practice requiring tipped employees to perform duties that are unrelated to their tipped occupations or requiring them to perform related duties that are not directly tip-producing in excess of 20% of their working time. Nor has she identified a common unlawful policy of requiring tipped employees to reimburse Defendants for walkouts or shortages. Plaintiff's vague declarations, which are devoid of details regarding when and for how long certain duties were performed, cannot form the basis of a common unlawful practice. The declarations do not support the conclusion that anyone besides the five declarants engaged in any of the alleged practices. In other words, to the extent the five declarants engaged in these practices, their testimony does not establish that these were *common* practices at Defendants' 23 locations. Nor can the side work lists which Plaintiff cites show that there was a common unlawful policy or practice, since those lists do not establish any unrelated duties or the amount of time spent on any particular duty and are not used uniformly at all restaurants. The key question here is how much time each server or bartender spent on particular side work duties and that question, by its very nature, turns on the individual experiences of each server and bartender, involving a number of factors that cannot be generalized.

This case also cannot be conditionally certified on the theory that Plaintiff and others were subject to a common policy of being required to reimburse Defendants for customer walkouts or cash shortages. Plaintiff and her declarants do not specify *when* such reimbursements occurred. If they did occur, it was not a common practice across Defendants' 23 locations. Indeed, other employees *never* were required to reimburse Defendants for walkouts or cash drawer shortages (and many individuals did not even maintain a cash drawer and, therefore, are not part of the collective).

ARGUMENT

I. CONDITIONAL CERTIFICATION IS NOT AUTOMATIC

Plaintiff's recitation of the standard of review falsely suggests there is an automatic presumption in favor of conditional certification. But "automatic preliminary class certification is at odds with the Supreme Court's recommendation to 'ascertain the contours of the action at the outset.'" *Bosley v. Chubb Corp.*, No. 04-4598, 2005 WL 1334565, at *3 (E.D. Pa. June 3, 2005) (*quoting Hoffman La-Roche, Inc. v. Sperling*, 495 U.S. 165, 171-72 (1989)); *see also Brooks v. BellSouth Telecomm's, Inc.*, 164 F.R.D. 561 (N.D. Ala. 1995), *aff'd* 114 F.3d 1202 (11th Cir. 1997). Instead, before conditional certification is granted, Plaintiff bears the "burden of showing a 'reasonable basis' for [her] claim" that the case should be certified as a collective action -- a burden that is not invisible, and cannot be sustained by "only counsel's unsupported assertions that FLSA violations [are] widespread…." *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1261 (11th Cir. 2008) (quoting *Haynes v. Singer Co.*, 696 F.2d 884, 887 (11th Cir. 1983)).

To meet her burden, Plaintiff must show there are other employees who wish to opt-in to this action, and that the potential opt-ins are "similarly-situated" to her. *Alvarez v. City of Chicago*, 605 F. 3d 445, 442 (7th Cir. 2010). Plaintiff must also show that trial of a collective action would be manageable *Gromek v. Big Lots, Inc.*, No. 10-C-4070, 2010 WL 5313792, at *2 (N.D. Ill. Dec. 17, 2010). Plaintiff has fallen far short of meeting her burden.

II. PLAINTIFF FAILS TO PRESENT EVIDENCE OF A COMMON UNLAWFUL POLICY

Plaintiff must show that she and putative opt-ins "together were victims of a common policy or plan that violated the law." *Myers v. Hertz Corp.*, 624 F.3d 537, 555 (2d Cir. 2010) (emphasis added). A plaintiff cannot satisfy her burden with unsupported allegations. *Barfield v. New York City Health and Hosps. Corp.*, No. 05 Civ. 6319 JSR, 2005 WL 3098730, at *1 (S.D.N.Y. Nov. 18, 2005); *Mares v. Caesars Entm't, Inc.*, No. 06-CV-60, 2007 WL 118877, at *3 (S.D. Ind. Jan. 10, 2007); *West v. Border Foods, Inc.*, No. 05-2525 (DWF/RLE), 2006 WL 1892527, at *9 (D. Minn. July 10, 2006) (denying conditional certification where no evidence supports "conclusory assertion of widespread violations"). Here, Plaintiff has not demonstrated that all tipped employees were together victims of a common policy or plan that violated the law. Rather, she offers only conclusory allegations of 5 individuals at 4 restaurants.[1]

A. There is No Common, Unlawful Policy of Requiring Duties That Are Unrelated to Serving Customers

Plaintiff claims that KPW violated the tip credit provision of the FLSA by allegedly requiring servers and bartenders to perform duties unrelated to their tipped occupations. ECF No. 22 at 11. Put differently, Plaintiff claims KPW required its tipped employees to perform "dual jobs." Plaintiff believes that KPW should have compensated its tipped employees at minimum wage for any time spent on these alleged unrelated duties, regardless of the percentage of time they spent on such duties. Plaintiff bears the burden of showing that she and the class "were not performing their tipped occupations for at least a portion of their shift." *Driver v. AppleIllinois, LLC,* 890 F. Supp. 2d 1008, 1029 (N.D. Ill. 2012). She cannot show this.

Plaintiff's and her four declarants' testimony only speaks to their individual experiences. But evidence that *some* employees were not compensated for work is insufficient to merit conditional certification. *Thompson v. Speedway Superamerica LLC*, No. 08-cv-1107, 2009 WL 130069, at *1 (D. Minn. Jan. 20, 2009). Rather, Plaintiff must offer evidence that "the reason why the employees were not compensated . . . is not because of human error or a rogue store manager, but because of a corporate decision" to engage in a certain practice. *Id.* at *2; *see also Saleen v. Waste Management, Inc.*, No. 08-cv-4959, 2009 WL 1664451, at *4-7 (denying motion for conditional certification where 112 declarations failed to show that the reason why employees worked off the clock was due to a single decision, policy, or plan).

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[1] Out of hundreds of Defendants' current and former employees at their 23 restaurants.

The proffered testimony only addresses the alleged practices at four restaurants.[2] To the extent the declarants purport to testify regarding companywide practices, their statements are merely conclusory and cannot support conditional certification. *See Wacker v. Personal Touch Home Care, Inc.*, No. 4:08-cv-93, 2008 U.S. Dist. LEXIS 101078, at *10-12 (E.D. Mo. Nov. 5, 2008) (requiring plaintiff to rely on competent evidence and not a conclusory affidavit from a former manager who lacked personal knowledge of defendant's office outside of Missouri); *West*, 2006 WL 1892527, at *6 (eliminating averments that were not based on personal knowledge or were conclusory). "Such a limited sampling of employees does not support the Plaintiffs' assertion of widespread violations resulting from a common policy or plan." *Id.* at *6; *Harrison v. McDonald's Corp.*, 411 F. Supp. 2d 862, 870-71 (S.D. Ohio 2005) (averments from two out of a potential class of 300 were not enough to conditionally certify a class); *Flores v. Lifeway Foods, Inc.*, 289 F. Supp. 2d 1042, 1046 (N.D. Ill. 2003) (evidence from two out of fifty putative collective action members not sufficient).

Moreover, many of the tasks identified by Plaintiff and the four declarants are *related* to their duties as a server or bartender and thus are not outside the tipped occupation as Plaintiff would have

[2] Plaintiff worked only at the BWW in Algonquin, Illinois. Pl. Ex. A at ¶ 1. Opt-In LaMarcus White worked only at the BWW in Rockville, Maryland. Pl. Ex. B at ¶ 2. Opt-Ins Tarae Jackson and Jerome Frederick worked only at the BWW in Laurel, Maryland. Pl. Ex. C. at ¶ 2; Pl. Ex. D. at ¶ 2. Plaintiff Brian Ramirez Rojas worked only at the BWW in Skokie, Illinois. They do not have any personal knowledge of the operations at the other nineteen restaurants at issue.

the Court believe. For example, the declarants claim they had to fill buckets with ice, prepare soda machines, stock server stations, slice lemons for drinks, set up and stock the bar, clean tables, roll silverware, and wipe down certain areas of the restaurant and bar. As explained by the regulations to the FLSA and the DOL's interpretive guidance, however, such activities are *related* to a tipped occupation. The dual jobs regulation identifies a server's "time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses" as duties that are related to her tipped occupation. 29 C.F.R. § 531.56(e) (explaining that "[s]uch related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips"). Similarly, the DOL's Handbook recognizes that servers may spend time on "maintenance and preparatory or closing activities," such as cleaning and setting tables, making coffee, and occasionally washing dishes or glasses. U.S. Dept. of Labor Field Operations Handbook Ch. 30d00(e) (Dec. 9, 1988) (available at http:// www. dol.gov); *see also* U.S. Dept. of Labor Fact Sheet #15: Tipped Employees Under the Fair Labor Standards Act, Revised March 2011 (same) (available at http://www.dol.gov).

In *Roberts v. Apple Sauce, Inc.*, 945 F. Supp. 2d 995 (N.D. Ind. 2013), the court refused to conditionally certify a similar claim. The plaintiff claimed that tipped employees were required "to perform dishwashing, food preparation, kitchen and bathroom cleaning, trash removal, and other duties outside the scope of the tipped occupations, while paying those employees at the tip-credit wage rate." *Id.* at 999. The court concluded that the claim was "based on a faulty legal conclusion."

> Servers, bartenders, and hosts – who directly relate with customers – are not also employed in the second occupation of dishwasher, cook, or janitor simply because an unspecified amount of time during their shift is spent performing the duties cited in the amended complaint: 'dishwashing, food preparation, kitchen and bathroom cleaning, [and] trash removal.'

Id. at 1000-01. The court relied on the dual jobs regulation and the DOL's guidance, all of which confirm that such duties are related to a servers' occupation. *Id.* at 1001-03.

Further, it does not matter that certain of the side work that Plaintiff and the declarants say they performed was performed on opening and closing shifts either before the restaurants opened or after the restaurants closed. In an Opinion Letter, the DOL addressed whether certain tasks that servers in a restaurant performed after closing still qualified for the tip credit. U.S. Dept. of Labor, Wage and Hour Division, Opinion Letter WH-502, 1980 DOLWH LEXIS 1 (March 28, 1980). The DOL concluded that time spent by servers after the restaurant closed cleaning the salad bar, placing condiment crocks in the cooler, cleaning and stocking the waitress stations, cleaning and resetting the tables (including filling cheese, salt and pepper shakers), and vacuuming the dining room carpet "constitute tipped employment within the meaning of the regulation." *Id.* The servers were not engaged in dual jobs while they were performing the "after-hours clean-up." *Id.* Accordingly, if the activities that Plaintiff describes were part of a policy, plan, or practice, it was not one that would violate the FLSA, and therefore cannot be the basis for a collective action. *See Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 548 (6th Cir. 2006) (plaintiff must show that it and others "were victims of a common policy or plan that *violated the law*"); *Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp.2d 459, 467 (S.D.N.Y. 2008) (emphasis added); *Xavier v. Belfor USA Group, Inc.*, 585 F. Supp.2d 873, 878-79 (E.D. La. 2008) (refusing to grant conditional certification because plaintiff provided inadequate evidence of a "single [company] decision, policy, or plan that violated the law").

Indeed, the only work that Plaintiff and the declarants describe that arguably falls outside their tipped occupations is bathroom cleaning. But there is no common practice of servers and bartenders cleaning bathrooms. Some *never* cleaned bathrooms: Wirth Decl. ¶ 8; Balderez Decl. ¶ 7; Rohn Decl. ¶ 13; Vaughn Decl. ¶ 11; Ketterman Decl. ¶ 9; Robles Decl. ¶ 9; Singleton Decl. ¶ 9; Rolon

Decl. ¶ 14 (only cleans bathroom as a cashier, when clocked in to receive full minimum wage);[3] and none of the Maryland declarants testify that they *ever* cleaned bathrooms; *see* Pl's Exs. B, C, D.

Servers and bartenders also never worked in the kitchen. Lammey Decl. ¶ 11; Wirth Decl. ¶ 9; Lopez Decl. ¶ 17; Balderez Decl. ¶ 8; Rohn Decl. ¶ 12 (worked in kitchen as expeditor when clocked in at full minimum wage); Shanley Decl. ¶ 13; Vaughn Decl. ¶ 11; Ketterman Decl. ¶ 9; Robles Dec. ¶ 9; Martinez Decl. ¶ 7; Singleton Decl. ¶ 10; Farrell Decl. ¶ 14; Santiago Decl. ¶ 8; Rolon Decl. ¶ 15. Others never vacuumed floors (Rohn Decl. ¶ 14 (no vacuum at restaurant); Shanley Decl. ¶ 12 (same); Balderez Decl. ¶ 7); emptied ashtrays or performed other work in parking lot (Vaughn Decl. ¶ 11; Rohn Decl. ¶ 13; Lopez Decl. ¶ 16; Wirth Decl. ¶ 8; Rolon Decl. ¶ 12; Singleton Decl. ¶ 9); set up patio (Balderez Decl. ¶ 7; Lopez Decl. ¶ 16; Lopez Decl. ¶ 16 (restaurant does not have a patio); Rolon Decl. ¶ 12; Singleton Decl. ¶ 9; Shanley Decl. ¶ 11); deck scrubbed floors (Rohn Decl. ¶ 13; Balderez Decl. ¶ 7); mopped (Balderez Decl. ¶ 7; Rolon Decl. ¶ 12; Shanley Decl. ¶ 11); washed dishes (Balderez Decl. ¶ 7; Wirth Decl. ¶ 8); cleaned and bleached drains (Rohn Decl. ¶ 13; Lopez Decl. ¶ 16; Wirth Decl. ¶ 8; Singleton Decl. ¶ 9); cleaned the restaurant walls (Rohn Decl. ¶ 13; Balderez Decl. ¶ 7; Wirth Decl. ¶ 8; Rolon Decl. ¶ 12; Singleton Decl. ¶ 9; Shanley Decl. ¶ 11); set up glass rimmer (Rohn Decl. ¶ 13); cleaned walk-in cooler (Rohn Decl. ¶ 13); dusted various items or areas of the restaurant (Balderez Decl. ¶ 7; Rolon Decl. ¶ 12; Singleton Decl. ¶ 9; Shanley Decl. ¶ 11); set up the bar (Balderez Decl. ¶ 7; Lopez Decl. ¶ 16; Singleton Decl. ¶ 9); or lifted chairs from the tops of tables (Rolon Decl. ¶ 12). In other words, Plaintiff would have the Court certify a collective of individuals who performed unrelated duties, based only on her limited, conclusory testimony, contrary to that of multiple other servers and bartenders.

[3] Defendants' declarations are filed herewith as Exhibits 1 through 14 and are ordered alphabetically by declarant last name. They represent testimony from 14 servers and bartenders at seven separate restaurants.

B. There is No Common Policy that Tipped Employees Perform Non-Tipped Work that Exceeds 20% of an Employee's Time in a Work Week

Plaintiff claims that Defendants violated the tip-credit provisions by requiring tipped employees to perform duties that are related to their tipped occupation but not directly tip producing for more than 20% of their time in a work week. But there is no common policy or practice of this, and the weight of the evidence before the Court shows that the opposite is true, *i.e.*, Defendants' tipped employees spend less than 20% of their time in each workweek on side work.

Plaintiff's declarations do not show a common policy or practice. Plaintiff generalizes as to what *all* servers were required to do, without providing any basis for alleged knowledge of the practice of others. For example, she says that "morning shift servers" were "required to come in in approximately one hour before the restaurant opened." It is unclear how she can know what *all* morning shift servers did, when she has only worked at the Algonquin restaurant. Indeed, Plaintiff's testimony is false as to servers and bartenders at other locations, who did *not* consistently arrive an hour before the restaurant opened. *See* Rolon Decl. ¶ 3 (as opener, arrived at 10:00 a.m. Mondays and Tuesdays and 10:30 a.m. on other days); Singleton Decl. ¶ 6 (as an opener, arrived 30 minutes before restaurant opens); Farrell Decl. ¶ 7 (opening side work takes between 10 and 20 minutes).

Although Plaintiff lists duties that she allegedly performed, she does not state when or how often she performed them, or how long they took, and nor does she have any knowledge of others (particularly at other restaurants) performing such duties. *See Ide v. Neighborhood Restaurant Partners, LLC*, 32 F. Supp. 3d 1285, 1294 (N.D. Ga. 2014), *aff'd* No. 15-11820, 2016 WL 3564379 (11th Cir. July 1, 2016) (denying conditional certification and explaining "the fact that Defendants' tip credit employees" at Plaintiff's location "performed non-tipped duties for an undefined amount of time does not properly establish their entitlement to minimum wage compensation."); *Langlands v. JK & T Wings, Inc.*, No. 15-13551, 2016 WL 4073548, at *2 (E.D. Mich. Aug. 1, 2016).

In *Langlands*, the plaintiffs filed a similar lawsuit against a Buffalo Wild Wings franchisee in Michigan. Their motion for conditional certification was supported by the declarations of two individuals, Langlands and Monte. Langlands' own declaration said that "she was required to perform non-tipped duties on a 'regular basis' and they 'regularly exceeded 20% of the total time spent working... in a given week.'" *Langlands*, 2016 WL 4073548, at *2. The declaration contained "no more detail; no list of tasks or an approximate time that it took to complete each task." *Id.* The court concluded that "the declaration is bare bones and does not convey Langlands' individual experience as much as it appears to be a recitation drafted by an attorney." *Id.* Monte's declaration listed "alleged non-tipped tasks. However, like Langlands['s] [declaration, it made]… no attempt to estimate the time spent on each task or provide any detail regarding how regularly it was assigned." *Id.* The court held this evidence was insufficient to grant conditional certification, even when combined with other alleged evidence, including side work lists.

As in *Langlands*, the declarations from Plaintiff list tasks without any explanation of when, how frequently, or for how long those tasks were performed. The declarations summarily conclude that other employees performed the same tasks, without providing any foundation for the declarants' alleged knowledge. As in *Langlands*, the declarations do not "attempt to estimate the time spent on each task or provide any detail regarding how regularly it was assigned." *Langlands,* 2016 WL 4073548, at *2. As in *Langlands*, Plaintiff and the Opt-Ins conclude that they spend more than 20% of their time performing non-tipped work.[4] As in *Langlands*, this Court should find that there is no common unlawful policy of excessive side work. As the *Langland* court explained:

> No one disputes Defendant requires employees to do non-tipped side work. What is at issue is whether Plaintiffs spend more than twenty percent of their time on these tasks. Plaintiffs are not able to point to any part of the policy that suggests side work exceeds

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[4] Pl. Ex. A ¶ 16 (50%); Pl. Ex. B ¶ 2 (40%); Pl. Ex. C ¶ 10 (50%); Pl. Ex. D ¶ 11 (40-50%); Pl. Ex. E. ¶ 11 (50%).

> a permissible amount, and the… declarations fail to provide sufficient factual support for the allegation that these tasks cross an illegal threshold.

Langlands, 2016 WL 4073548, at *3. Here too, Defendants do not dispute that their tipped employees--like others in the restaurant industry--perform side work. But there is no evidence of a common policy or practice of excessive side work (over 20%).

1. Servers and bartenders Spend Less Than 20% of Their Time In A Work Week on Side Work

Contrary to Plaintiff's assertions, servers and bartenders do not perform excessive side work. The actual amounts of time servers and bartenders spend on side work in any given work week varies widely. *See* Lammey Decl. ¶ 12 (10-15% of time in a work week spent on side work); Wirth Decl. ¶ 11 (about 15%); Lopez Decl. ¶ 13 (sometimes around 13%); Balderez Decl. ¶ 20 (15%); Rohn Decl. ¶ 18 (between 8 and 18%); Vaughn Decl. ¶ 12 (4-5%); Ketterman Decl. ¶ 10 (8% or less); Robles Decl. ¶ 12 (8-9%); Santiago Decl. ¶ 10 (between 12 and 20%, average is 15%); Farrell Decl. ¶ 16 (always less than 20%); Singleton Decl. ¶¶ 11-12 (about 6-7%); Martinez Decl. ¶ 11 (about 11%, never more than 20%); Rolon Decl. ¶ 18 (10-16%, never more than 20%); Shanley Decl. ¶ 17 (5-25% per day, but never over 20% per week). Plaintiff's and her declarants' testimony that their side work well exceeds 20% of their time in a work week shows that they are not similarly situated to other servers and bartenders, where 13 servers and bartenders from seven different restaurant locations in Illinois and Maryland have testified under oath that they never spend more than 20% of their time on side work and that the amount of time they do spend varies.

2. The Side Work Duties of Individual Servers and Bartenders Vary

There is no common policy requiring servers and bartenders to perform side work for over 20% of their work week. This is illustrated by the various duties that individuals perform, which show the extremely individualized experiences of unique servers and bartenders. Their experiences vary widely from the experience of Plaintiff and her declarants.

Side work varies based on the type of shift. Servers and bartenders on opening shifts typically perform side work before the restaurant opens in order to prepare the restaurant to serve their guests. The amount of time they arrive before the restaurant opens varies based on location and individual practices. Rolon Decl. ¶ 3 (as opener, arrived at 10:00 a.m. Mondays and Tuesdays and 10:30 a.m. remainder of days); Singleton Decl. ¶ 6 (as an opener, arrived 30 minutes before restaurant opens); Farrell Decl. ¶ 7 (opening side work takes between 10 and 20 minutes). They also perform running side in varying amounts. *E.g.*, Santiago Decl. ¶ 9 (10 minutes); Farrell Decl. ¶ 9 (30 minutes); Lopez Decl. ¶ 7 (5-20 minutes). Some servers and bartenders *never* work opening shifts, so they never perform any pre-shift side work. *E.g.*, Lopez Decl. ¶ 2; Balderez Decl. ¶ 2. Some do not close. Shanley Decl. ¶ 2.

Servers and bartenders on "mid" or "volume" shifts (those shifts where employees neither open nor close the restaurants) sometimes are assigned tables of guests to serve immediately upon arriving at work and, therefore, perform only running side work. Lopez Decl. ¶ 2; Rohn Decl. ¶ 2. Servers that do not open sometimes do not perform any pre-shift side work and must rely on the preparatory work of others. *E.g.*, Vaughn Decl. ¶ 6; Santiago Decl. ¶ 5. Side work varies based on whether there are big sporting events on television, Lammey Decl. ¶ 9, or special events at the restaurant. Lopez Decl. ¶¶ 8, 12 (more side work during weekly "Kids' Night", but noting she never vacuums). The amount and type of side work varies based on how busy the restaurant is, customer demands, and staffing levels at the restaurant, and other individualized practices unique to servers or bartenders or to individual restaurant locations. *See* Rohn Decl. ¶ 9; Wirth Decl. ¶ 10; Lammey Decl. ¶ 12; Rolon Decl. ¶ 16.

3. The Side Work Lists Do Not Show a Common, Unlawful Policy

Plaintiff also relies on several side work lists to support her motion. But Plaintiff does not explain what restaurant or what time period to which they apply, if any. Moreover, KPW does not have a uniform list of side work tasks. Instead, managers at each of the 23 restaurants were free to prepare their own lists, if any. Some restaurants do not use side work lists at all. Shanley Decl. ¶ 4 ("[R]estaurant does not use… side work lists… I have not seen.. side work list[s in] over two years." As trainer, tells new servers "there are no side work lists….") Plaintiff's Exhibits F and G show the wide variety of different formats and content that the side work lists at various KPW restaurants has taken. For example, Plaintiff makes much of the fact that one side work list (Exhibit G) purports to break down side work by the minute. But there is no evidence that opening servers actually followed this schedule. What's more, there was no common policy to arrive at the restaurant at 10:00 a.m., where servers and bartenders testify that they did *not* arrive at 10:00 a.m., *see* Rolon Decl. ¶ 3 (as opener, arrived at 10:00 a.m. Mondays and Tuesdays and 10:30 a.m. remainder of days); Singleton Decl. ¶ 6 (as an opener, arrived 30 minutes before restaurant opens); Farrell Decl. ¶ 7 (opening side work takes between 10 and 20 minutes), so this supposed "schedule" was not followed across Defendants' 23 locations.[5]

C. There is No Common Practice of Reimbursements for Shortages or Walkouts

Plaintiff alleges that servers and bartenders were required to reimburse KPW for walkouts and cash drawer shortages. Plaintiff fails to show that KPW had a common unlawful policy or practice of requiring servers and bartenders to reimburse their restaurants for customer walkouts or cash drawer shortages. Plaintiff's declaration--and those of the Opt-Ins--is void of any details regarding *when* walkouts or shortage occurred, or the amounts of such shortages. On the other hand, servers and bartenders have testified under oath that they were *never* subject to these alleged practices. Specifically: (1) servers and bartenders never paid for customer walkouts (Rolon Decl. ¶ 28; Martinez Decl. ¶ 15; Lammey Decl. ¶ 24; Vaughn Decl. ¶ 18; Wirth Decl. ¶ 19; Ketterman Decl. ¶

[5] Plaintiff's argument that managers cross-training or working at different restaurants also fails. There is no evidence that these managers were trained on side work policies or practices..

17; Balderez Decl. ¶ 18; Lopez Decl. ¶ 22 (had no walkouts); Santiago Decl. ¶ 18 (same)); (3) servers did not maintain a cash drawer (Rolon Decl. ¶ 28; Lopez Decl. ¶ 23); (4) bartenders never had to reimburse the restaurant for a cash drawer shortage (Vaughn Decl. ¶ 19; Wirth Decl. ¶ 20). These varying scenarios show that Plaintiff is not similarly situated to other servers and bartenders who, likewise, are not similarly situated to each other. These differences also illustrate the individualized inquiries that would be necessary to determine as to each individual whether a violation occurred.

III. PLAINTIFF'S PROPOSED COLLECTIVE ACTION IS UNMANAGEABLE

The Court should reject Plaintiff's motion because the case would be unmanageable as a collective action. *See Gromek*, 2010 WL 5313792, at *2 (declining first-stage conditional certification based on manageability concerns) "This is not an appropriate case for a collective action because it is utterly unmanageable." *Williams v. Accredited Home Lenders, Inc.*, No. 1:05-CV-1681-TWT, 2006 WL 2085312, at *5 (N.D. Ga. July 25, 2006). Cases are unmanageable as collective actions where they involve fact-intensive inquiries and individualized defenses that would require hundreds of mini-trials.[6]

Here, each tipped employee's purported claim depends on circumstances unique to her, including: (i) the types of shifts she worked (opening, closing, volume); (iii) the amount of side work she performed; (iv) the type of side work she performed; (v) how long the side work took, which depends on myriad factors including individual efficiency, staffing levels in the restaurant, customer demands, and efficiency of co-workers; (vi) whether she experienced customer walkouts; (vii) whether she was responsible for maintaining a cash drawer; (viii) whether she experienced cash drawer shortages; (ix) and whether she was responsible for reimbursing the company for walkouts or cash drawer shortages, despite the fact that there was never a policy requiring this.

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[6] *Beecher v. Steak N Shake Operations, Inc.*, 904 F. Supp.2d 1289, 1293 (N.D. Ga. 2012) (denying conditional certification because the "case could result in . . . mini-trials of more than 2 million corrections made to time and tip records of the putative class"); *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 775 (7th Cir. 2013). *See Rodgers v. CVS Pharmacy, Inc.*, No. 8:05-CV-770T-27MSS, 2006 WL 752831, at *5 (M.D. Fla. Mar. 23, 2006) (stating that "the court must consider whether the employees are similar with respect to their job requirements and pay provisions and the commonality of their claims"); *Robinson v. Dolgencorp, Inc.*, No. 5:06-cv-122-Oc-10GRJ, 2006 WL 3360944, at *1, *6-7 (M.D. Fla. Nov. 13, 2006) (denying class certification because putative class members did not perform the same duties as plaintiff, held different positions than plaintiff, and worked different hours from plaintiff); *Reeves v. Alliant Techsystems, Inc.*, 77 F. Supp. 2d 242, 249 (D.R.I. 1999) (named plaintiffs not similarly situated to opt-in plaintiffs where they had different managers and worked on different client contracts).

The Court would need to delve into this, and other, testimony that is unique to each individual, resulting in unmanageable mini-trials for each tipped employee. The key inquiry into Plaintiff's side work claim is not simply whether side work occurred (which is of course lawful), but rather, whether side work exceeds the threshold of 20% of time in a work week. Determining which servers and bartenders spend more than 20% of their time on side work, and in what work weeks, is a nearly impossible venture that would require individualized testimony. This is not merely a question of damages, but one of liability, since no liability attaches if an individual did not spend in excess of 20% of his time in a work week on side work duties related to his tipped occupation.

IV. PLAINTIFF'S PROPOSED NOTICE IS INAPPROPRIATE

Plaintiff has not satisfied her burden to demonstrate that the Court should allow notice to issue, but if it does, the following concerns should be addressed:

1. Plaintiff requests that the notice be sent via first class U.S. Mail and email. Email is unnecessary. *See Reab v. Elec. Arts, Inc*., 214 F.R.D. 623, 631 (D. Colo. 2002).

2. Plaintiff requests that a reminder notice be sent. A reminder notice is "unnecessary and potentially could be interpreted as encouragement by the court to join the lawsuit." *See Wolfram v. PHH Corp*., 2012 U.S. Dist. LEXIS 181073, at *11 (S.D. Ohio Dec. 21, 2012) (single method typically sufficient); *Wlotkowski v. Michigan Bell Tel. Co.*, 267 F.R.D. 213, 220 (E.D. Mich. 2010).

3. The language in Paragraph 2 of the Notice is inaccurate. Specifically, it implies that Here's Wings, LLC "operate[s]" the BWW restaurants. This is incorrect. Here's Wings, LLC owns the Illinois restaurants, but has nothing to do with the Maryland restaurants.

4. Paragraph 6 of the notice addresses "What happens if I join the lawsuit," but fails to inform potential opt-ins of the obligations they may have if they join, including answering written discovery, sitting for a deposition, giving testimony in Court, and potentially paying costs incurred by Defendants in the defense of this matter. *See Koenig v. Bourdeau Contr. LLC*, No. 4:13-cv-00477, 2013 U.S. Dist. LEXIS 156217, at*11-13 (E.D. Mo. Oct. 31, 2013). Full disclosure is necessary to ensure that individuals make an informed decision as to whether to

join the case, and helps minimize the potential for opt-ins who prove unwilling to comply with discovery. Paragraph 6 should include the following statement: "By joining this action, you may be required to provide information or documents, appear in person or otherwise actively participate in this action by testifying in a deposition and/or at trial. Your Counsel will assist you in these activities."

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's motion.

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on December 16, 2016, she caused a true and correct copy of the foregoing OPPOSITION TO PLAINTIFF'S MOTION FOR STEP-ONE NOTICE to be served via the Court's electronic filing system on the following attorneys of record in this matter:

Douglas M. Werman
Maureen A. Salas
Sarah J. Arendt
Zachary C. Floweree
WERMAN SALAS P.C.
77 West Washington, Suite 1402
Chicago, IL 60602
Email: dwerman@flsalaw.com
msalas@flsalaw.com
sarendt@flsalaw.com
zflowerree@flsalaw.com

s/ Laura E. Reasons
Laura E. Reasons